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A. Pleading

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West's Key Number Digest

West's Key Number Digest, Customs and Usages 15(1), 18

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IV. Pleading and Proof

A. Pleading

1. Necessity

§ 34. Necessity of pleading custom or usage generally

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West's Key Number Digest
West's Key Number Digest, Customs and Usages 18

Courts take judicial notice of the customs and usages which are generally known or accepted to an extent sufficient to make them a matter of common knowledge.[1]

On the other hand, if a custom is not so general in its character that it will be presumed to have been known to the parties or of which a court will take judicial notice, the party relying on the custom or usage must plead it in order to permit the acceptance of evidence of such custom.[2] Other courts have held that a custom or usage upon which a party relies should ordinarily be specially pleaded.[3]

It has been held that it is unnecessary to plead a custom or usage where it is so general that it is presumed to have been known by the parties to a contract.[4]

There is authority that states if custom and usage is set up as an affirmative defense, it must be specifically pleaded.[5] The pleading requirement may be met via an amendment to the party's pleading, but it must be timely.[6]

In some jurisdictions, statutory law requires that evidence of usage of trade offered by one party is inadmissible unless and until the other party has received notice and the court finds no unfair surprise exists.[7]

Footnotes

1 Am. Jur. 2d, Evidence[WestlawNext®(r) Search Query].

2 § 35.

[3] Rains v. Weiler, 101 Kan. 294, 166 P. 235 (1917).

[4] Hayter Trucking, Inc. v. Shell Western E&P, Inc., 18 Cal. App. 4th 1, 22 Cal. Rptr. 2d 229 (5th Dist. 1993).

[5] Winn v. Turner, 55 Ill. App. 3d 291, 13 Ill. Dec. 475, 371 N.E.2d 170 (4th Dist. 1977).

[6] Johnson v. Hoffman, 7 N.J. 123, 80 A.2d 624, 26 A.L.R.2d 1001 (1951) (abrogated on other grounds by, Mahoney v. Minsky, 39 N.J. 208, 188 A.2d 161 (1963)).

[7] Cox v. Lewiston Grain Growers, Inc., 86 Wash. App. 357, 936 P.2d 1191, 33 U.C.C. Rep. Serv. 2d 443 (Div. 3 1997).

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IV. Pleading and Proof

A. Pleading

1. Necessity

§ 35. Local, special, trade, or business custom or usage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Customs and Usages 18

Where a custom or usage is a special or particular one, or is local in character, the party who proposes to rely upon it is required to aver it in his or her pleadings; otherwise, such party cannot, over the objection of the other party, prove it,[1] except where such evidence is proper in rebuttal of testimony offered by the defendant.[2] If a custom is not so general in its character that it will be presumed to have been known to the parties or of which a court will take judicial notice, the court offering such evidence must plead it, in order to warrant the acceptance of evidence of such custom.[3] Those particular customs, usages, or practices used in various lines of trade and business must be pleaded where they are offered as the basis of recovery or defense, where courts reason they are of a particular rather than a general nature, and therefore not matters of which the courts may take judicial notice.[4]

Under the Uniform Commercial Code, evidence of a relevant usage of trade offered by one party is not admissible unless and until such party has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.[5]

Footnotes

1 Roy L. Willard, Inc. v. Miller, 150 Fla. 458, 8 So. 2d 489 (1942); Gary v. Miami Corp., 546 So. 2d 318 (La. Ct. App. 3d Cir. 1989); Cox v. Lewiston Grain Growers, Inc., 86 Wash. App. 357, 936 P.2d 1191, 33 U.C.C. Rep. Serv. 2d 443 (Div. 3 1997).

2 Goldman v. Great Lakes Foundry Co., 230 Mich. 524, 203 N.W. 103 (1925); Groskin v. Knight, 290 Pa. 274, 138 A. 843 (1927).

3 J. H. Arnold & Co. v. Gibson, 216 Ala. 314, 113 So. 25 (1927); Iusi v. Chase, 169 Cal. App. 2d 83, 337 P.2d 79 (1st Dist. 1959).

[4] Palmer v. Humiston, 87 Ohio St. 401, 101 N.E. 283 (1913); Tauer v. Williams, 69 Wyo. 388, 242 P.2d 518 (1952) (drilling industry).

[5] U.C.C. § 1-303(g), discussed in Am. Jur. 2d, Commercial Code[WestlawNext®(r) Search Query].

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IV. Pleading and Proof

A. Pleading

1. Necessity

§ 36. Construction of contract; custom or usage as part of contract

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Customs and Usages 15(1), 18

Some courts hold that evidence of a local custom or usage applied to a special or particular class of business is not admissible even to explain the ambiguous terms of a contract unless it is pleaded.[1] But other courts hold that evidence of certain customs and usages is admissible without pleading such matter where the purpose is not to vary the contract in question but merely to aid in the interpretation of certain terms used therein which possess some peculiar or technical meaning.[2]

Where a party seeks to rely on custom or usage evidence to create an enforceable contractual obligation, or to add important provisions to a definite contract on the theory that, by implication, the known custom became an integral part of the agreement because the parties must have contracted with this in mind, the party must specifically plead the custom or usage.[3] However, where the plaintiff is basing the cause of action not upon an express contract but upon an implied contract depending upon custom or usage, the plaintiff is not required to plead the matter.[4]

Footnotes

1 Elmore, Quillian & Co. v. Parish Bros., 170 Ala. 499, 54 So. 203 (1911); Gilbert v. Citizens' Nat. Bank of Chickasha, 1916 OK 880, 61 Okla. 112, 160 P. 635 (1916).

2 Winn v. Turner, 55 Ill. App. 3d 291, 13 Ill. Dec. 475, 371 N.E.2d 170 (4th Dist. 1977); Cure v. City of Jefferson, 396 S.W.2d 727 (Mo. 1965).

3 Porterfield v. American Surety Co. of New York, 201 Mo. App. 8, 210 S.W. 119 (1919); Klein Bank v. Lumbermen's Investment Corp., 1989 WL 107702 (Tex. App. Houston 14th Dist. 1989) (holding that party had to plead that opponent had actual or constructive knowledge of the alleged custom or usage which was deemed necessary before the proponent could introduce evidence to create a contractual obligation or add an integral provision to a definite

contract); Katzer v. Cron & Dehn, 183 Wash. 215, 48 P.2d 204 (1935).

[4] Bowles Livestock Commission Co. v. Midland Nat. Bank of Billings, 94 Mont. 467, 23 P.2d 967 (1933).

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A. Pleading

1. Necessity

§ 37. Custom or usage incidental to main issues

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Customs and Usages 18

An exception to the general rule requiring the pleading of a custom or usage[1] applies in those cases where such matter is relied upon in reference to incidental issue or to provide evidentiary support of some fact in issue rather than as the direct basis of a contractual or other obligation.[2]

Footnotes

1 § 34.

2 Rains v. Weiler, 101 Kan. 294, 166 P. 235 (1917); Davis v. Whitsett, 1967 OK 190, 435 P.2d 592 (Okla. 1967); Codd v. Westchester Fire Ins. Co., 14 Wash. 2d 600, 128 P.2d 968, 151 A.L.R. 316 (1942).

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IV. Pleading and Proof

A. Pleading

2. Sufficiency

§ 38. Sufficiency of pleading of custom or usage generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Customs and Usages 18

Where a special pleading of a custom or usage is required,[1] all the essential requisites of a valid and binding custom or usage must be alleged.[2]

Footnotes

1 §§ 34 to 36.

2 Illinois Central R. Co. v. Maxwell, 292 Ky. 660, 167 S.W.2d 841 (1943).

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IV. Pleading and Proof

A. Pleading

2. Sufficiency

§ 39. Pleading of knowledge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Customs and Usages 18

Where a special pleading of a custom or usage is required,[1] the pleading should either aver knowledge of the person to be charged or allege facts authorizing the conclusion that the custom or usage was of such general notoriety that such person will be presumed to have knowledge; a mere allegation of the existence of a custom or usage omitting any mention of knowledge or its equivalent generally will be found to be insufficient.[2]

Footnotes

1 §§ 34 to 36.

2 Smart v. Haase, 79 Conn. 587, 65 A. 972 (1907); Jordan v. Cartwright, 347 S.W.2d 799 (Tex. Civ. App. Fort Worth 1961).

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West's Key Number Digest

West's Key Number Digest, Customs and Usages 15(2), 19(.5) to 22

A.L.R. Library

A.L.R. Index, Contracts
A.L.R. Index, Custom and Usage
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IV. Pleading and Proof

B. Evidence and Witnesses

1. In General

§ 40. Evidence of custom or usage generally; burden of proof

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Customs and Usages 19(.5) to 21

Although a court may look to known customs or usages in a particular industry to determine the meaning of a contract, the parties must prove those customs or usages using affirmative evidentiary support in a given case.[1]

When a particular custom or usage relied upon as the basis of a claim or defense is not one of which a court will take judicial notice, nor is so general in character so as that knowledge of it will be imputed or presumed, the proponent of the evidence has the burden of pleading[2] and proving[3] its existence. The same burden of proof generally applies in situations governed by the Uniform Commercial Code[4] and for the proffer of course of dealing evidence.[5]

Unless the usage of trade is so well-known that it may be judicially noticed, the burden of proving a usage of trade is on the party who asserts it.[6]

It is incumbent on one relying on custom and usage evidence as a basis of recovery or defense not only to allege[7] and prove such custom but also to prove that the person sought to be bound thereby had either actual knowledge thereof and contracted with reference to it[8] or that the custom was so general as to raise the presumption of knowledge.[9]

A party may first attempt to show the existence of a custom before a showing that the other party had knowledge thereof.[10]

To raise a fact issue as to the existence of particular custom and usage, the party seeking to establish that custom and usage must establish that the practice is fixed and invariable.[11]

A usage which is sanctioned by judicial decisions becomes the law of the place, and no further proof is necessary to establish it.[12]

Usages are presumed to be reasonable, and the person attacking them has the burden of showing their unreasonableness.[13]

Footnotes

[1] M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926, 190 L. Ed. 2d 809 (2015).

[2] § 34.

[3] SR Intern. Business Ins. Co., Ltd. v. World Trade Center Properties, LLC, 467 F.3d 107, 71 Fed. R. Evid. Serv. 613 (2d Cir. 2006) (applying New York law); Gibbs Patrick Farms, Inc. v. Syngenta Seeds, Inc., 76 Fed. R. Evid. Serv. 9, 65 U.C.C. Rep. Serv. 2d 447 (M.D. Ga. 2008); Sharple v. AirTouch Cellular of Georgia, Inc., 250 Ga. App. 216, 551 S.E.2d 87 (2001); Pickus Const. and Equipment v. American Overhead Door, 326 Ill. App. 3d 518, 260 Ill. Dec. 512, 761 N.E.2d 356 (2d Dist. 2001); Gary v. Miami Corp., 546 So. 2d 318 (La. Ct. App. 3d Cir. 1989); Mullinnix LLC v. HKB Royalty Trust, 2006 WY 14, 126 P.3d 909 (Wyo. 2006).

[4] Corestar Intern. Pte. Ltd. v. LPB Communications, Inc., 513 F. Supp. 2d 107, 62 U.C.C. Rep. Serv. 2d 967 (D.N.J. 2007), subsequent determination, 2007 WL 2990896 (D.N.J. 2007).

[5] Fleet Capital Corp. v. Yamaha Motor Corp., U.S.A., 48 U.C.C. Rep. Serv. 2d 1137 (S.D. N.Y. 2002).

[6] All Angles Const. & Demolition, Inc. v. Metropolitan Atlanta Rapid Transit Authority, 246 Ga. App. 114, 539 S.E.2d 831 (2000).
As to judicial notice of customs and usages, see Am. Jur. 2d, Evidence[WestlawNext®(r) Search Query].

[7] § 35.

[8] Smith v. Erftmier, 210 Neb. 486, 315 N.W.2d 445 (1982); Pacific Horizon Distributing, Inc. v. Wilson, 249 Or. 591, 439 P.2d 874 (1968).

[9] American Bar Endowment v. Mutual of Omaha Ins. Co., 2002 WL 480960 (N.D. Ill. 2002).

[10] Douglas & Mizell v. Ham Turpentine Co., 210 Ala. 180, 97 So. 650 (1923).

[11] SR Intern. Business Ins. Co., Ltd. v. World Trade Center Properties, LLC, 467 F.3d 107, 71 Fed. R. Evid. Serv. 613 (2d Cir. 2006) (applying New York law).

[12] Cookendorfer v. Preston, 45 U.S. 317, 4 How. 317, 11 L. Ed. 992, 1846 WL 5704 (1846).

[13] Lichter v. Land Title Guarantee & Trust Co., 77 Ohio L. Abs. 342, 150 N.E.2d 70 (Ct. App. 10th Dist. Franklin County 1957).

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IV. Pleading and Proof

B. Evidence and Witnesses

1. In General

§ 41. Admissibility of evidence

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Customs and Usages 19(2)

Evidence offered for the purpose of proving a custom or usage must be relevant and material to the issues of the case.[1]

Evidence may be relevant to explain the practice of the industry in question or to establish what someone in the industry probably would know.[2] Customary practice is deemed irrelevant when inconsistent with statutory law.[3] If a contract is not ambiguous, evidence of custom is irrelevant.[4]

While one memorandum does not create a custom, it may constitute strong evidence that a custom exists, particularly when it was drafted by a consortium purporting to represent the industry as a whole.[5]

In a contempt proceeding based on the employment of detectives by the defendant in a criminal case to shadow jurors, evidence of a practice of the Department of Justice to cause its officers to shadow jurors is rightly excluded as irrelevant.[6] Some courts hold that to be admissible, the relevancy and probative value of such evidence must be clearly shown.[7] Where evidence of usage is admitted for a limited purpose, as, for example, for purposes of interpretation, its use must be limited to the clearing up of the ambiguity in question.[8]

Evidence which tends to rebut the proof of a usage or custom is admissible[9] and evidence of custom and practice can be used to rebut evidence of fact.[10]

Evidence is not admissible to show that usage was in fact different from that which it was established to be by judicial decisions but it may be shown that it was subsequently changed.[11]

An exception to the usual rule prohibiting the use of hearsay evidence applies in reference to proof of custom.[12]

Usage and custom ordinarily may be proved by oral testimony.[13] Parol evidence of the custom and practice of the parties is

admissible,[14] even where a trade term would be intelligible without the parol evidence,[15] provided the usage or custom offered into evidence otherwise meets the requisite criteria.[16]

Footnotes

1 Sexton Law Firm, P.A. v. Milligan, 329 Ark. 285, 948 S.W.2d 388 (1997); Varni Bros. Corp. v. Wine World, Inc., 35 Cal. App. 4th 880, 41 Cal. Rptr. 2d 740, 26 U.C.C. Rep. Serv. 2d 1054 (5th Dist. 1995), as modified on denial of reh'g, (July 7, 1995).

2 U.S. v. Leo, 941 F.2d 181, 34 Fed. R. Evid. Serv. 715 (3d Cir. 1991).

3 Walker v. U.S., 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (2007).

4 North Grand Mall Associates, LLC v. Grand Center, Ltd., 278 F.3d 854 (8th Cir. 2002).

5 Sunbeam Corp. v. Liberty Mut. Ins. Co., 566 Pa. 494, 781 A.2d 1189 (2001).

6 Sinclair v. U.S., 279 U.S. 749, 49 S. Ct. 471, 73 L. Ed. 938, 63 A.L.R. 1258 (1929).

7 Magone v. Luckemeyer, 139 U.S. 612, 11 S. Ct. 651, 35 L. Ed. 298 (1891); Magnolia Lumber Corp. v. Czerwiec Lumber Co., 207 Miss. 738, 43 So. 2d 204 (1949).

8 Oelricks v. Ford, 64 U.S. 49, 23 How. 49, 16 L. Ed. 534, 1859 WL 10647 (1859).

9 Taylor v. U S, 44 U.S. 197, 3 How. 197, 11 L. Ed. 559, 1845 WL 6007 (1845).

10 S.C. Labor Ltd., LLC v. Eastern Tree Service, Inc., 362 S.C. 654, 609 S.E.2d 305 (Ct. App. 2005).

11 Cookendorfer v. Preston, 45 U.S. 317, 4 How. 317, 11 L. Ed. 992, 1846 WL 5704 (1846).

12 Ellicott v. Pearl, 35 U.S. 412, 9 L. Ed. 475, 1836 WL 3721 (1836); Tecon Waikiki, Inc. v. Queen Emma Foundation, 1998 WL 7155 (N.D. Tex. 1998).

13 Energy Development Corp. v. Moss, 214 W. Va. 577, 591 S.E.2d 135 (2003).

14 Mejia v. Trustees of Net Realty Holding Trust, 304 A.D.2d 627, 759 N.Y.S.2d 91 (2d Dep't 2003); Energen Resources MAQ, Inc. v. Dalbosco, 23 S.W.3d 551 (Tex. App. Houston 1st Dist. 2000).

15 H. Molsen & Co., Inc. v. Raines, 534 S.W.2d 146 (Tex. Civ. App. El Paso 1975), writ dismissed, (Apr. 28, 1976).

16 §§ 5 to 16.

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B. Evidence and Witnesses

1. In General

§ 42. Admissibility of evidence—Expert and opinion evidence

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Customs and Usages 15(2), 19(2), 19(3)

West's Key Number Digest, Evidence 482

Testimony regarding industry custom and practice is opinion evidence and as such requires either testimony through an opinion witness or through a lay witness who meets the appropriate criteria under the pertinent evidentiary rules.[1]

Expert testimony is admissible to prove custom and usage in an industry,[2] but expert testimony is not absolutely required to establish a specific trade meaning usage.[3] Evidence of trade usage need not take the form of expert evidence; any management-level employee of a business engaged in a particular trade should be familiar with the meaning of the words used in that trade and thus fit the definition of a lay witness entitled to give opinion evidence.[4]

Custom and practice may be established by opinion testimony of a person with personal knowledge or by the introduction of specific instances of conduct sufficient in number to support a finding of routine practice.[5]

Where evidence of a trade custom or usage is pertinent to the issues of a case, and is not of such character that judicial notice will be taken of it, it may be proved by the testimony of witnesses engaged in the particular trade and familiar with its practices.[6]

A court can consider extrinsic evidence of the testimony of experts regarding industry custom and practice to resolve ambiguities in a contract or other agreement.[7]

Expert evidence of general usage is admissible when the issue is not within the common knowledge of the jury and the testimony is necessary in order that they may understand it.[8]

An expert may not testify about custom and practice where such testimony constitutes opinions as to legal duties that arise under the law.[9]

The opinion of one witness may be deemed insufficient to establish a custom or usage.[10] Thus, evidence of an industry custom generally should be presented by several witnesses so as to establish the general knowledge and acceptance of the purported custom or usage within a particular industry.[11]

Where an expert has firsthand knowledge of a custom and usage, it is not necessary to show that he has witnessed its use in factual circumstances identical to those of the case in which he testifies.[12]

It need not be shown that a custom was followed in every case by every company in order to establish an industry custom.[13]

Since it is the fact, or existence, of a trade usage which is open to proof, the opinion of an expert should be confined to the actual trade usage and not to any implications of rights or liabilities springing from such usage.[14]

The existence of a custom cannot be proved by the opinions of witnesses that it ought to exist.[15]

Footnotes

1 Smith v. MHI Injection Molding Mach., Inc., No. 10 C 8276, 2015 WL 7008128 (N.D. Ill. Nov. 12, 2015).

2 Howard Entertainment, Inc. v. Kudrow, 208 Cal. App. 4th 1102, 146 Cal. Rptr. 3d 154 (2d Dist. 2012).

3 Mitsubishi Intern. Corp. v. Interstate Chemical Corp., 67 U.C.C. Rep. Serv. 2d 614 (S.D. N.Y. 2008); In re Nutritional Sourcing Corp., 398 B.R. 816 (Bankr. D. Del. 2008).

4 Dakota, Minnesota & Eastern R.R. Corp. v. Wisconsin & Southern R.R. Corp., 657 F.3d 615 (7th Cir. 2011).

5 Dunlop v. U.S., 165 U.S. 486, 17 S. Ct. 375, 41 L. Ed. 799 (1897); Technology Solutions Co. v. Northrop Grumman Corp., 356 Ill. App. 3d 380, 292 Ill. Dec. 784, 826 N.E.2d 1220 (1st Dist. 2005).

6 The City of Washington, 92 U.S. 31, 23 L. Ed. 600, 1875 WL 17854 (1875); Peterson v. Permanente S. S. Corp., 129 Cal. App. 2d 579, 277 P.2d 495 (1st Dist. 1954).

7 Dickson v. Sklarco L.L.C., 2014 WL 4443423 (W.D. La. 2014); Wadi Petroleum, Inc. v. Ultra Resources, Inc., 2003 WY 41, 65 P.3d 703 (Wyo. 2003).

8 Ehrlich v. Zlot, 2015 WL 2149253 (Cal. App. 1st Dist. 2015), unpublished/noncitable, (May 7, 2015).

9 U.S. v. Leo, 941 F.2d 181, 34 Fed. R. Evid. Serv. 715 (3d Cir. 1991); Krys v. Aaron, Comm. Fut. L. Rep. (CCH) P 33494, 2015 WL 3660332 (D.N.J. 2015).

10 Roper Whitney of Rockford, Inc. v. TAAG Mach. Co., No. 99 C 50032, 2002 WL 425925 (N.D. Ill. Mar. 18, 2002).

11 Roper Whitney of Rockford, Inc. v. TAAG Mach. Co., No. 99 C 50032, 2002 WL 425925 (N.D. Ill. Mar. 18, 2002).

12 American Bar Endowment v. Mutual of Omaha Ins. Co., 2002 WL 480960 (N.D. Ill. 2002).

13 American Bar Endowment v. Mutual of Omaha Ins. Co., 2002 WL 480960 (N.D. Ill. 2002).

14 Pacific Mut. Life Ins. Co. v. Arnold, 262 Ky. 267, 90 S.W.2d 44 (1935).

15 Wise v. Reeve Electronics, Inc., 183 Cal. App. 2d 4, 6 Cal. Rptr. 587 (2d Dist. 1960); Anderson v. Davis, 314 Mo. 515, 284 S.W. 439 (1926).

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B. Evidence and Witnesses

1. In General

§ 43. Competency of witness

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Customs and Usages 19(.5), 19(3)

West's Key Number Digest, Evidence 21, 111

Custom, usage, and common practice regarding the interpretation of clauses may be relevant to resolve ambiguities or to explain why particular clauses may have been chosen but only with regard to witnesses who have knowledge of relevant customs, usages, and practices or are tendered as experts on such subjects.[1] A court may require evidence of the putative witness' experience before finding that he or she is qualified to offer custom and usage testimony.[2] In order for witnesses to be qualified to testify as to the existence of a custom, it should appear that they possess knowledge thereof and they may be examined to show their means of knowledge and how such knowledge was acquired.[3] A witness need not represent an entire industry in order to have sufficient knowledge of that industry's customs and practices so as to render substantial assistance to the jury.[4]

Where it appears that the witness is not familiar with the usage or custom involved, his or her testimony must be rejected.[5]

Footnotes

1 In re September 11th Liability Insurance Coverage Cases, 2005 WL 425267 (S.D. N.Y. 2005) (not reported).

2 Highland Capital Management, L.P. v. Schneider, 551 F. Supp. 2d 173 (S.D. N.Y. 2008); M & G Polymers USA, LLC v. Carestream Health, Inc., 2009 WL 3535466 (Del. Super. Ct. 2009), judgment aff'd, 9 A.3d 475 (Del. 2010) (not reported); Fillingane v. Siemens Energy & Automation, Inc., 809 So. 2d 737 (Miss. Ct. App. 2002).

3 Dunlop v. U.S., 165 U.S. 486, 17 S. Ct. 375, 41 L. Ed. 799 (1897); Hertz Corp. v. RAKS Hospitality, Inc., 196 S.W.3d 536 (Mo. Ct. App. E.D. 2006).

[4] U.S. v. Fallon, 470 F.3d 542 (3d Cir. 2006); Howard Entertainment, Inc. v. Kudrow, 208 Cal. App. 4th 1102, 146 Cal. Rptr. 3d 154 (2d Dist. 2012).
As to the qualification of expert witnesses with reference to the source of their knowledge and skill, see Am. Jur. 2d, Expert and Opinion Evidence[WestlawNext®(r) Search Query].

[5] Camden v. Doremus, 44 U.S. 515, 3 How. 515, 11 L. Ed. 705, 1845 WL 5993 (1845); Grube v. Donnell Exploration Co., 286 S.W.2d 179 (Tex. Civ. App. El Paso 1955), writ refused n.r.e.

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IV. Pleading and Proof

B. Evidence and Witnesses

2. Weight and Sufficiency of Evidence

§ 44. Weight and sufficiency of evidence of custom and usage generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Customs and Usages 19(3)

Establishing a usage or custom requires proof by clear and convincing evidence.[1] Evidence must establish that the custom or practice was definite and fixed and in existence for a long enough time to be known by the parties.[2] A party does not establish custom and usage simply by presenting particular occasions on which experts appeared to endorse its interpretation of a technical term.[3]

Evidence must show a custom or usage so widespread in the industry as to support a valid presumption that the parties had knowledge of the special usage and intended limited meanings when they employed the terms.[4]

A custom or usage can only be proved by numerous instances of actual practices and not by the opinion of a witness.[5]

Uniform Commercial Code requirements for proof of trade usage are less stringent than common law requirements.[6] Under the Uniform Commercial Code, wherein trade usage is defined as any practice having such regularity of observance as to justify an expectation that it will be observed with respect to the transaction in question,[7] it is sufficient proof of a trade usage to show evidence of repeated applications of the practice or of recognition and acceptance by members of the particular industry.[8]

Proof of isolated instances in which a particular practice was followed does not establish a custom or usage.[9] Evidence of the custom of one person or of one transaction is not sufficient to establish a custom or usage[10] nor to establish a course of performance.[11]

The proponent of custom and usage evidence must submit sufficient evidence of the opponent's understanding of the industry meaning of the challenged term.[12]

The weight to be given evidence of an industry practice is a matter committed exclusively to the trial court.[13]

Footnotes

1 North River Ins. Co. v. Employers Reinsurance Corp., 197 F. Supp. 2d 972 (S.D. Ohio 2002); Howard University v. Roberts-Williams, 37 A.3d 896, 278 Ed. Law Rep. 422 (D.C. 2012); Davis v. Key Gas Corp., 34 Kan. App. 2d 728, 124 P.3d 96 (2005); Brass Metal Products, Inc. v. E-J Enterprises, Inc., 189 Md. App. 310, 984 A.2d 361 (2009).

2 Law Debenture Trust Co. of New York v. Maverick Tube Corp., 595 F.3d 458 (2d Cir. 2010); Insurance & Consulting Associates, LLC v. ITT Hartford Ins. Group, 48 F. Supp. 2d 1181 (W.D. Mo. 1999); Bernard Nat. Loan Investors, Ltd. v. Traditions Management, LLC, 688 F. Supp. 2d 347 (S.D. N.Y. 2010).

3 SR Intern. Business Ins. Co. Ltd. v. World Trade Center Properties, LLC, 445 F. Supp. 2d 320 (S.D. N.Y. 2006).

4 Kenney v. Chesapeake, 2015-Ohio-1278, 31 N.E.3d 136 (Ohio Ct. App. 7th Dist. Columbiana County 2015).

5 U.S. for Use of E. & R. Const. Co., Inc. v. Guy H. James Const. Co., 390 F. Supp. 1193 (M.D. Tenn. 1972), aff'd, 489 F.2d 756 (6th Cir. 1974).

6 Western Industries, Inc. v. Newcor Canada Ltd., 739 F.2d 1198, 16 Fed. R. Evid. Serv. 901, 38 U.C.C. Rep. Serv. 1458 (7th Cir. 1984).

7 U.C.C. § 1-303(c), discussed in § 1.

8 Posttape Associates v. Eastman Kodak Co., 450 F. Supp. 407, 23 U.C.C. Rep. Serv. 855 (E.D. Pa. 1978).

9 North River Ins. Co. v. Employers Reinsurance Corp., 197 F. Supp. 2d 972 (S.D. Ohio 2002) (applying New Jersey law); Pickus Const. and Equipment v. American Overhead Door, 326 Ill. App. 3d 518, 260 Ill. Dec. 512, 761 N.E.2d 356 (2d Dist. 2001).

10 Craddock Mfg. Co. v. Faison, 138 Va. 665, 123 S.E. 535, 39 A.L.R. 1309 (1924).

11 Hughes Electronics Corp. v. Citibank Delaware, 120 Cal. App. 4th 251, 15 Cal. Rptr. 3d 244, 53 U.C.C. Rep. Serv. 2d 950 (2d Dist. 2004) (even two prior transactions insufficient); Cravotta v. Deggingers' Foundry, Inc., 288 P.3d 871, 79 U.C.C. Rep. Serv. 2d 81 (Kan. Ct. App. 2012), unpublished.

12 Beaverkettle Farms, Ltd. v. Chesapeake Appalachia, LLC, 2013 WL 4679950 (N.D. Ohio 2013).

13 Mission Ins. Co. v. Hartford Ins. Co., 155 Cal. App. 3d 1199, 202 Cal. Rptr. 635 (5th Dist. 1984).

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IV. Pleading and Proof

B. Evidence and Witnesses

2. Weight and Sufficiency of Evidence

§ 45. Testimony of one witness

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Generally, a custom or usage must be established by more than one witness so as to raise a presumption that others knew it or should have known of it.[1] In the same vein, the testimony of one officer as to that company's practices is generally insufficient to establish such a pattern.[2]

However, usage may be established by the testimony of one witness if he or she appears to have extensive knowledge and experience in regards to the subject about which he or she speaks, testifies explicitly to the duration and universality of the usage, and is not contradicted.[3]

Footnotes

1 Technology Solutions Co. v. Northrop Grumman Corp., 356 Ill. App. 3d 380, 292 Ill. Dec. 784, 826 N.E.2d 1220 (1st Dist. 2005).

2 H & W Industries, Inc. v. Occidental Chemical Corp., 911 F.2d 1118, 12 U.C.C. Rep. Serv. 2d 921 (5th Cir. 1990); Maurice Elec. Supply Co., Inc. v. Anderson Safeway Guard Rail Corp., 632 F. Supp. 1082 (D.D.C. 1986).

3 Robinson v. U.S., 80 U.S. 363, 20 L. Ed. 653, 1871 WL 14858 (1871); Daugherty v. Burns, 331 Ill. App. 3d 562, 265 Ill. Dec. 199, 772 N.E.2d 237 (4th Dist. 2002); John P. Pettyjohn & Sons v. Basham, 126 Va. 72, 100 S.E. 813, 38 A.L.R. 391 (1919).

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IV. Pleading and Proof

B. Evidence and Witnesses

2. Weight and Sufficiency of Evidence

§ 46. Province of court and jury

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The Uniform Commercial Code provides that the existence and scope of a usage of trade are to be proved as facts, but where it is established that such a usage is in a written trade code or similar record, the interpretation of the record is a question of law.[1] Likewise, the Restatement of Contracts[2] provides that the existence and scope of a usage of trade are to be determined as questions of fact and that if a usage is embodied in a written trade code or similar writing, the interpretation of the writing is to be determined by the court as a question of law.

The existence of the custom or usage of trade and its scope are ordinarily issues of fact,[3] which, in cases tried before a jury, is to be determined, like other factual questions, by the jury.[4] The weight to be assigned to custom and usage evidence is a question for the jury.[5] Other matters that have been deemed questions of fact include—

— whether a custom or practice has become part of the contract by implication through long-standing observance or acquiescence of the parties.[6]

— how much weight to give evidence of usage of trade.[7]

— whether there was a usage of trade that the parties either knew or had reason to know.[8]

— whether a certain practice constitutes a trade custom or usage.[9]

— the existence of a usage of trade or trade practice.[10]

— the scope of a usage of trade.[11]

— whether a course of dealing exists between the parties.[12]

Although the existence of a prior course of dealing between the parties or usage of trade is usually an issue of fact for the jury, where one party has not contested the material facts of its prior course of dealing, the courts may find, as a matter of law, that a course of dealing existed.[13]

Even though the existence of a usage of trade must be proven by clear and satisfactory evidence, the ultimate determination to construe the contract in light of the usage of trade lies within the discretion of the trier of fact.[14]

Under the Uniform Commercial Code, whether there is a usage of trade and the scope of such usage are questions of fact for determination by the trier of fact; however, if the trade usage has been reduced to writing by a trade code, the question of the existence and scope of the usage becomes a question of law for determination by the court.[15]

A jury question regarding a party's knowledge of a custom and usage is not required where, upon a showing that a custom is general and universal, the parties are presumed to know of its existence.[16]

Footnotes

1 U.C.C. § 1-303(c), discussed in Am. Jur. 2d, Commercial Code[WestlawNext®(r) Search Query].

2 Restatement Second, Contracts § 222(2).

3 SR Intern. Business Ins. Co., Ltd. v. World Trade Center Properties, LLC, 467 F.3d 107, 71 Fed. R. Evid. Serv. 613 (2d Cir. 2006) (applying New York law); Galardi v. Naples Polaris, LLC, 301 P.3d 364, 129 Nev. Adv. Op. No. 33 (Nev. 2013); Come Big or Stay Home, LLC v. EOG Resources, Inc., 2012 ND 91, 816 N.W.2d 80 (N.D. 2012); Keith v. River Consulting, Inc., 365 S.C. 500, 618 S.E.2d 302 (Ct. App. 2005); Sutton v. Malibu Development Corp., 153 Wash. App. 1017, 2009 WL 4024766 (Div. 1 2009).

4 Adams v. Norris, 64 U.S. 353, 23 How. 353, 16 L. Ed. 539, 1859 WL 10589 (1859); Come Big or Stay Home, LLC v. EOG Resources, Inc., 2012 ND 91, 816 N.W.2d 80 (N.D. 2012).

5 Knickerbocker Life Ins. Co. v. Pendleton, 115 U.S. 339, 6 S. Ct. 74, 29 L. Ed. 432 (1885); Scapa Tapes North America, Inc. v. Avery Dennison Corp., 384 F. Supp. 2d 544 (D. Conn. 2005).

6 Railway Labor Executives' Ass'n v. National R.R. Passenger Corp., 691 F. Supp. 1516 (D.D.C. 1988).

7 Swift & Co. v. Elias Farms, Inc., 539 F.3d 849 (8th Cir. 2008).

8 Sharple v. AirTouch Cellular of Georgia, Inc., 250 Ga. App. 216, 551 S.E.2d 87 (2001).

9 Voest-Alpine Trading USA Corp. v. Bank of China, 288 F.3d 262, 47 U.C.C. Rep. Serv. 2d 693 (5th Cir. 2002); Smith Enterprises, Inc. v. In-Touch Phone Cards, Inc., 2004 ND 169, 685 N.W.2d 741 (N.D. 2004).

10 Trustees of University of Pennsylvania v. St. Jude Children's Research Hosp., 982 F. Supp. 2d 518, 304 Ed. Law Rep. 950 (E.D. Pa. 2013) (applying Pennsylvania law); Pickus Const. and Equipment v. American Overhead Door, 326 Ill. App. 3d 518, 260 Ill. Dec. 512, 761 N.E.2d 356 (2d Dist. 2001); Langer v. Bartholomay, 2008 ND 40, 745 N.W.2d 649 (N.D. 2008).

11 Galardi v. Naples Polaris, LLC, 301 P.3d 364, 129 Nev. Adv. Op. No. 33 (Nev. 2013); Peace River Seed Co-Operative, Ltd. v. Proseeds Marketing, Inc., 355 Or. 44, 322 P.3d 531, 83 U.C.C. Rep. Serv. 2d 242 (2014); Internacional Realty, Inc. v. 2005 RP West, Ltd., 449 S.W.3d 512 (Tex. App. Houston 1st Dist. 2014).

12 Midwest Trading Group, Inc. v. GlobalTranz Enterprises, Inc., 59 F. Supp. 3d 887 (N.D. Ill. 2014), adhered to on denial of reconsideration, Fed. Carr. Cas. P 84824, 2015 WL 1043554 (N.D. Ill. 2015); Axis Const. Corp. v. O'Brien Agency, Inc., 87 A.D.3d 1092, 929 N.Y.S.2d 869 (2d Dep't 2011).

13 Great Northern Ins. Co. v. ADT Sec. Services, Inc., 517 F. Supp. 2d 723 (W.D. Pa. 2007).

14 Dana Partners, L.L.C. v. Koivisto Constructors & Erectors, Inc., 2012-Ohio-6294, 2012 WL 6783637 (Ohio Ct. App. 11th Dist. Trumbull County 2012).

15 U.C.C. § 1-303(c), as discussed in Am. Jur. 2d, Commercial Code[WestlawNext®(r) Search Query].

16 Energen Resources MAQ, Inc. v. Dalbosco, 23 S.W.3d 551 (Tex. App. Houston 1st Dist. 2000).

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